

European Union and United Kingdom: Divergent approaches to reasonable accommodations for carers

In brief

A recent decision of the European Court of Justice (ECJ) gives primary carers of disabled children the right to reasonable accommodations at work, as well as protection from "associative" indirect disability discrimination. This will expand these carers' current rights in the EU Member States, although the precise impact and timescales will vary from state to state. In this article, we summarise the EU position and the practical implications in Italy (where the dispute arose), France and Germany. We also explain how this decision marks a divergence with the UK's approach and highlight potential further expansions of EU equalities law in this space.

Key takeaways

EU Member States should now ensure that employers are required to make reasonable accommodations for employees who are primary carers of disabled children, except in situations where this would impose a disproportionate burden on the employer. The underlying rationale of this decision is the protection of the disabled child.

This will have a real impact on organisations with workforces in the EU, as it marks a significant U-turn in EU equalities law. As described below, neither Italy, Germany nor France have thus far imposed such an obligation (in line with previous EU case law). Carers might have other employment rights in those countries (notably in Italy), but none of them currently have an all-encompassing right to reasonable accommodations for carers.

It is likely that change will be quicker to come in Italy, out of these three countries. In France, by contrast, legislative change will likely be required, which is difficult in the current political climate there.

The ECJ's decision on "associative" indirect disability discrimination is also a novel development of this concept (explained in more detail below); it comes close to elevating the status of carer of a disabled child into a type of protected characteristic. In practical terms, it will be another legal route for such carers to require workplace adjustments to accommodate their caring responsibilities.

UK employers are not under a duty to make reasonable adjustments for non-disabled people, whether a carer or not. Nor does the UK have the same concept of associative indirect discrimination. It does have a concept called "same disadvantage" indirect discrimination but, for the reasons explained below, this does not operate in the same way. In practical terms, it does not require any immediate changes to employment practices in the UK.

The Italian view

Italian law already grants significant rights to carers. However, these rights are fragmented, having developed piecemeal. We conclude that the ECJ's decision will clarify and expand this package of rights.

Currently, carers' rights include caring leave and a limited list of specific types of workplace adjustments:

- Three days of leave a month.
- The right to refuse a job transfer.
- The option to choose the work location closest to the person they assist.

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- Priority access to remote work or other forms of flexibility.

A carer in this context is someone who takes care of a spouse, civil union partner, or family member who, due to illness or disability, is not self-sufficient – i.e. it isn't just about carers of children, unlike the ECJ decision.

Separately, Italian law also already provides for reasonable accommodations for guardians and parents of minor children (in addition, naturally, to workers who themselves have disabilities), if these accommodations are necessary, suitable, relevant, and appropriate to the situation, and compatible with the resources available.

In addition, Italy has expanded its definition of discrimination to include any treatment or modification of working conditions that, for reasons including personal or family care needs, puts the worker: (i) at a disadvantage compared to others, (ii) in a position of limited participation in company life or decisions, or (iii) in a condition of limited career advancement. (This expansion took place after the facts in the current proceedings occurred.)

As can be seen therefore, Italy already has a significant level of discrimination and other protections for carers. The key change that the ECJ's decision brings about is that the rights that it creates are centered on the needs of the disabled child; it is in a way an extension of their rights. We think this nuance could lead to a step change in what the Italian courts consider to be a reasonable accommodation for a carer, albeit recognising that this will remain a highly fact-sensitive assessment.

The next steps are for the case to return to the Italian Supreme Court to make a final decision on the specific facts of the case, applying the clarifications provided by the ECJ. That decision will then set a legal precedent, and all national judges will conform to this interpretation in future disputes.

Moreover, it is highly likely that the impact will quickly extend to collective bargaining, prompting unions and companies to include specific clauses for the protection of carers in national and company-level collective agreements, in addition to the provisions already in place.

The French view

The current French legal framework does not create a duty to make reasonable adjustments for non-disabled carers of disabled children. French law is strong on disability discrimination and reasonable accommodations for disabled employees themselves (Code du travail, Articles L1132-1 and L5213-6), but does not extend these obligations to carers, nor is there any case law precedent to that effect.

Given this domestic legal landscape, we think that explicit legislative change will be required in order to introduce these rights for carers in France, but the current political instability in France means this is unlikely to happen in the foreseeable future.

In the meantime, carers are not left without any employment-related rights; far from it. They will be able to continue to rely on other protections, albeit that these are less powerful than a duty to make reasonable adjustments on the basis of caring responsibilities alone. These other protections include rights to flexible working arrangements (e.g., parental leave, part-time work, carer leave) with job protection and partial financial support.

In addition, some collective bargaining agreements at national, sector-wide level, or company-level may introduce enhanced protection and benefits for carers. For example, branch agreements in banking, transport, and retail sectors have introduced flexible working arrangements and additional leave for carers.

Several bills have recently been submitted to the French Parliament to strengthen the rights of carers, especially regarding carer leave, legal recognition of carer status, and access to support measures (training, psychological support, right to respite, work arrangements, better compensation) but, as already mentioned, the political instability in France is slowing their adoption.

Meanwhile, there is a growing trend for companies and sectors to negotiate agreements that specifically address the needs of carers and renewed commitments to professional equality and support, filling the legislative gap.

In summary, there is unlikely to be any immediate change "from the top" in France, but commercial or sectoral pressures and demands could continue the enhancement of carer-specific employment rights.

The German view

German law to date has been unclear on whether it covers discrimination by association. We consider that this judgment will lead to case law that seeks to give effect to the ECJ's decision, and so will have a meaningful impact on employers in Germany.

Germany's General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz – AGG) serves as the national implementation of Directive 2000/78/EC (see below). The AGG prohibits discrimination on various grounds, including disability, as explicitly stated in

Section 1. However, the scope of this protection, particularly in cases of associative discrimination, has long been a subject of legal debate.

Associative discrimination as the concept is interpreted in Germany refers to situations where an individual is treated unfavorably not because of their own protected characteristic, but due to their association with someone who possesses such a characteristic. In the context of disability, this could include parents, spouses, or carers of disabled individuals who face disadvantages in the workplace because of their caregiving responsibilities.

The AGG does not currently contain explicit provisions addressing this form of discrimination. Its wording does not clarify whether third parties, such as relatives or carers, are covered by the prohibition against unequal treatment. This legislative gap has led to uncertainty for employers and employees alike, particularly in cases where discrimination arises indirectly through association.

In the absence of clear statutory language, German courts are now tasked with interpreting the AGG in a manner consistent with EU law, including the recent ECJ decision. This means that individuals who are disadvantaged because they care for a disabled child, such as being denied flexible working arrangements or facing dismissal, can potentially invoke the AGG as a basis for legal protection.

For employers, this ruling has significant implications. It reinforces the obligation to ensure that workplace policies and practices do not indirectly discriminate against employees who are associated with disabled persons. Employers must be mindful of how caregiving responsibilities are accommodated and avoid decisions that could disproportionately affect such individuals.

The UK view

This judgment will not apply in the UK. The domestic position in the UK is:

- There is no duty to make reasonable adjustments for a non-disabled person.
- There is no mechanism for an indirect disability discrimination claim based on the employee's child's disability. The employee might try to claim "same disadvantage" indirect discrimination, but this may be difficult to make out in practice.

Both of the above points align with pre-Brexit ECJ case law, which was preserved in UK law. The ECJ's recent decision is a major change in reasonable adjustments law, and a novel expansion of associative discrimination, which does not apply to the UK, therefore creating a divergence between the EU's and UK's equalities legal frameworks.

"Same disadvantage" indirect discrimination: This applies to all protected characteristics. It occurs where:

- All the usual elements of an indirect discrimination claim are established (i.e. the employer applies a provision, criterion or practice (PCP) to a group but that PCP places people with a particular protected characteristic at a particular disadvantage as compared to others).
- The claimant does not share the relevant protected characteristic (e.g. the disability) but does suffer "substantively the same disadvantage" as those people who have the relevant protected characteristic.
- The employer cannot objectively justify the PCP.

The idea of "substantively the same disadvantage" is deceptively simple but could be interpreted in a restrictive or broad sense. Taking the facts of the present case as an example, the ECJ decision hinges around the disability of the claimant's child and the fact that she is his carer. The UK approach is different. It does not refer to the child's disability at all but instead starts from the premise that the claimant would need to identify a category of disabled employees who are placed at the same disadvantage as she is by a PCP of their employer. It may or may not be difficult to establish that some disabled people would find it hard to work non-fixed hours, just as a primary carer might also struggle, but this disadvantage arises for very different reasons in these two cases. It remains to be seen whether the UK courts will nevertheless treat this as "substantively the same disadvantage".

Because of the uncertainty with a "same disadvantage" claim, a claimant in similar circumstances to the claimant in this case might instead allege indirect sex discrimination (rather than disability), on the basis that women tend to have to take on caring responsibilities more than men do and so are statistically more likely to be disadvantaged by a requirement to work non-fixed hours. Interestingly, a same disadvantage claim might then come from a male employee if he in fact had caring responsibilities which made it difficult to work non-fixed hours. Again, however, the relevant protected characteristic in such a claim would be sex rather than disability.

Followers of UK equalities law might recall a non-binding employment tribunal decision that did uphold an associative indirect disability discrimination claim from a carer, similar in effect to the ECJ's recent decision. However, this predated the express

"same disadvantage" test that we now have and, for the reasons explained above, it is likely, in our view, that that decision would not be followed now.

Outside of equalities law, carers have a right to one week of unpaid carer's leave per year, and can request (but aren't guaranteed) flexible working arrangements. The remedies for breaches of these rights are relatively modest however.

Other EU Member States and future legal developments

It is not possible in an article to comment on the precise impact of the ECJ's decision in all 27 Member States. However, please reach out to your usual Baker McKenzie contact if you have a query about one of the Member States we haven't covered.

In terms of future developments it's worth noting first that the ECJ's decision is, strictly speaking, confined to the rights of primary carers of a disabled child, flowing from the special rights of the child. It will be for a future case to confirm whether these rights will extend to carers for disabled adults too.

It's also worth noting that the UK concept of "same disadvantage" indirect discrimination arose from a 2015 ECJ decision dealing with race discrimination (discussed below). That decision is binding on all EU Member States and so ought to be applied by them, and most likely in relation to all protected characteristics.

In more detail

The facts

The claimant in the national, Italian proceedings has a disabled child, for whom she is the primary carer. He lives with her and has extensive and comprehensive needs arising from his disability, which require a care programme at a fixed time in the afternoon.

The claimant worked in an underground railway station as a station operator, which usually required flexible working hours. She repeatedly asked her employer to appoint her permanently to a position with fixed working hours, at a lower level of qualification if required, to enable her to care for her son. Her employer declined this request for a permanent change to terms and conditions, although did make some temporary changes, including assigning her a fixed workplace and granting a preferential working schedule.

The claimant commenced legal proceedings to require her employer to make the requested permanent adjustment to her working conditions. This culminated with the Italian courts making a referral to the ECJ for a preliminary ruling on whether the EU concept of indirect discrimination covered a non-disabled carer of a disabled child, and also whether the duty to make reasonable accommodations extended to such a person.

The legal background

a) EU law:

The EU's Equal Treatment Framework Directive (Directive 2000/78/EC) prohibits indirect discrimination of disabled people. This occurs where an apparently neutral provision, criterion or practice (PCP) would put persons having a particular disability at a particular disadvantage compared with other persons, unless this can be objectively justified. Relatedly, the directive also requires employers to make reasonable accommodations for disabled people in order to participate in employment, unless this would impose a disproportionate burden on the employer.

The directive also prohibits direct disability discrimination. This occurs where a person is treated, or would be treated, less favourably than someone else on the grounds of disability. In 2008, the ECJ decided that direct disability discrimination could occur even if the victim was not disabled. This decision arose from a case where a mother suffered various detriments in the workplace which she said occurred because her son, for whom she was the primary carer, was disabled (*Coleman v Attridge Law*). This is usually referred to as **associative discrimination**. The term is perhaps misleading, as no association with the disabled person is actually required. The case did not address indirect discrimination.

Protection from race discrimination (both direct and indirect) arises under a different directive (Directive 2000/43) but is similarly worded to the Equal Treatment Framework Directive. In a 2015 case (*CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*), the ECJ decided that so-called associative discrimination could also arise in relation to indirect race discrimination. More specifically, the issue in this case was that CHEZ, an electricity company, had a PCP of placing electricity meters much higher up pylons in a particular district compared to others; that district being predominantly populated by Roma

people. The disadvantage was that people in that district could not check their meters. The claimant was not Roma but suffered the **same disadvantage** as her Roma neighbours, and the ECJ decided this was also within the scope of the protection from indirect discrimination. Again, the term "associative" is often used to describe this type of indirect discrimination, but the term is misleading (and in our view inappropriate), as no association with the disadvantaged group is required. It is more accurate to refer to this as "same disadvantage" indirect discrimination.

b) Member State implementation and the UK position post-Brexit:

EU Member States are required to give effect to directives' provisions as a minimum, as interpreted by the ECJ. They are also free to choose to grant additional protections, as can be seen in the Italian examples mentioned earlier in this article.

Most discrimination law of an EU origin that existed pre-Brexit has been preserved in UK law as part of post-Brexit legal arrangements. This includes the pre-Brexit ECJ decisions on "associative" discrimination mentioned above – both direct and indirect. For technical reasons, in order to retain the CHEZ principle, the UK specifically created a statutory concept of "same disadvantage" indirect discrimination. ECJ decisions post-Brexit are not binding in the UK, although its courts can have regard to them.

c) EU Charter of Fundamental Rights

Amongst other things, the Charter states that:

- Any discrimination based on disability is prohibited.
- Children have the right to such protection and care as is necessary for their well-being.
- The EU recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

These provisions are relevant to the interpretation of EU directives such as the Equal Treatment Framework Directive.

d) United Nations Convention on the Rights of Persons with Disabilities

As the EU has approved the Convention, its provisions must also be taken into account when interpreting EU directives. Amongst other things, the Convention requires signatory states:

- To prohibit all discrimination on the basis of disability.
- To take all appropriate steps to ensure that reasonable accommodation is provided.
- To take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.

The UK is also a signatory to this convention, but it does not have direct effect in the UK.

The ECJ judgment

The ECJ placed considerable reliance on the broad scope of the provisions of the Charter and the UN Convention as well as their specific provisions for the protection of children. With that in mind, it held that

- The EU protection from indirect discrimination applies to an employee who does not themselves have a disability but who is subject to such discrimination because of the assistance that they provide to their disabled child (such assistance enabling their child to receive the primary care required by virtue of their disability).
- The EU requirement to make reasonable accommodations also extends to such an employee, for the same reason of ensuring the primary care needs of their disabled child are met, provided that that accommodation does not impose an unreasonable burden on that employer.

To the extent that Member States' laws do not already include such protections they will now need to ensure that they do. As commented above, this may be easier in some Member States than others.

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